Office Supreme Court, U.S.
FILED
MAR 10 1983
ALEXANDER STEVAS,
CLERK

No. 82-500

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

THE SOUTHLAND CORPORATION, *et al.*,
Appellants,

—v.—

RICHARD D. KEATING, *et al.*,
Appellees.

On Appeal from the Supreme Court of California

JOINT APPENDIX

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March 1983

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APPEAL DOCKETED SEPTEMBER 22, 1982
JURISDICTION POSTPONED JANUARY 10, 1983

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NOTICE

The following materials have been omitted in printing this Joint Appendix because they appear on the following pages of the Appendix to the Jurisdictional Statement:

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LIST OF SIGNIFICANT DATES

CALIFORNIA JUDICIAL COUNCIL
COORDINATED PROCEEDING NO. 387

coordinating the following proceedings in the Superior Court of the State of California in and for the County of Alameda:

Keating, et al. v. *The Southland Corporation, et al.* (Super. Ct. No. 505159-9)

Gouveia, et al. v. *The Southland Corporation, et al.* (Super. Ct. No. 469216-2)

Battersby, et al. v. *The Southland Corporation, et al.* (Super. Ct. No. 390132)

Cheng, et al. v. *The Southland Corporation, et al.* (Super. Ct. No. 505162-3)

Coy, et. al. v. *The Southland Corporation, et al.* (Super. Ct. No. 506120-6)

Garza, et al. v. *The Southland Corporation, et al.* (Super. Ct. No. 505160-5)

Newell, et al. v. *The Southland Corporation, et al.* (Super. Ct. No. 505164-1)

Sampson, et al. v. *The Southland Corporation, et al.* (Super. Ct. No. 505161-4)

The Southland Corporation v. *Scovis, et al.* (Super. Ct. No. C-235779)

Date	Case	Proceedings—Filings
9/3/75	Gouveia (Ala. Co. Super. Ct.)	Complaint for Intentional and Negligent Misrepresentation; and for Rescission
9/12/75	Gouveia (USDC - N.D. Cal.)	Answer of Defendant The Southland Corporation to Complaint [accompanying petition for removal]
9/24/75	Gouveia (USDC - N.D. Cal.)	Amended Answer and Counterclaim of Defendant The Southland Corporation to Complaint
11/21/75	Gouveia (Ala. Co. Super. Ct.)	First Amended Complaint [following remand]
1/12/76	Gouveia (Ala. Co. Super. Ct.)	Answer of Defendant The Southland Corporation to First Amended Complaint
9/15/76	Garza (Santa Clara Co. Super. Ct.)	Complaint for Intentional and Negligent Misrepresentation and Breach of Contract
10/6/76	Sampson (Santa Clara Co. Super. Ct.)	Complaint for Intentional and Negligent Misrepresentation
10/25/76	Garza (Santa Clara Co. Super. Ct.)	Defendant The Southland Corporation's Answer to Complaint for Intentional and Negligent Misrepresentation and Breach of Contract
12/1/76	Cheng (Santa Clara Co. Super. Ct.)	Complaint for Intentional and Negligent Misrepresentation; Violation of Franchise Investment Law; Rescission; and Breach of Contract
12/31/76	Cheng (Santa Clara Co. Super. Ct.)	Answer of Defendant The Southland Corporation to Complaint for Intentional and Negligent Misrepresentation; Violation of Franchise Investment Law; Rescission; and Breach of Contract
1/4/77	Sampson (Santa Clara Co. Super. Ct.)	First Amended Complaint for Intentional and Negligent Misrepresentation

Date	Case	Proceedings—Filings
1/4/77	Newell (Santa Clara Co. Super. Ct.)	Complaint for Intentional and Negligent Misrepresentation; Violation of Franchise Investment Law; Rescission
2/3/77	Newell (Santa Clara Co. Super. Ct.)	Answer of Defendant The Southland Corporation to Complaint for Intentional and Negligent Misrepresentation; Violation of Franchise Investment Law; and Rescission; and Cross-Complaint of Defendant The Southland Corporation for Money Due on Account
2/16/77	Garza (Santa Clara Co. Super. Ct.)	First Amended Complaint
2/7/77	Sampson (Santa Clara Co. Super. Ct.)	Answer of Defendant The Southland Corporation to First Amended Complaint for Intentional and Negligent Misrepresentation
2/8/77	Sampson (Santa Clara Co. Super. Ct.)	Cross-Complaint of Defendant The Southland Corporation for Money Due on Account
3/7/77	Newell (Santa Clara Co. Super. Ct.)	[Newells'] Answer to Cross-Complaint for Money Due on Account
5/24/77	Keating (Santa Clara Co. Super. Ct.)	Complaint for Intentional Fraud, Negligent Fraud, Breach of Contract, Violation of the Franchise Investment Act and Declaratory Relief
6/13/77	Keating (USDC - N.D. Cal.)	Answer and Counterclaims of Defendant The Southland Corporation [accompanying petition for removal]
7/5/77	Keating (USDC - N.D. Cal.)	First Amended Answer and Counterclaims of Defendant The Southland Corporation

Date	Case	Proceedings—Filings
9/28/77	Keating (Santa Clara Co. Super. Ct.)	Notice of Hearing of Petition and Petition of The Southland Corporation for Order to Arbitrate, and Notice of Motion and Motion for Stay of Proceedings Pending Determination of Petition to Compel Arbitration and Pending Arbitration
10/6/77	Keating (Santa Clara Co. Super. Ct.)	Stipulation and Order for Change of Venue to Napa County Superior Court
10/19/77	Keating (Napa Co. Super. Ct.)	Notice of Hearing of Petition of The Southland Corporation for Order to Arbitrate, and Notice of Motion and Motion for Stay of Proceedings Pending Determination of Petition to Compel Arbitration and Pending Arbitration
10/20/77	Keating (Napa Co. Super. Ct.)	Answer of Defendant The Southland Corporation
12/5/77	Keating (Napa Co. Super. Ct.)	Plaintiffs' Brief in Opposition to Defendant's Motion to Compel Arbitration
12/12/77	Keating (Santa Clara Co. Super. Ct.)	The Southland Corporation's Reply to Plaintiffs' Brief in Opposition to Defendant's Motion to Compel Arbitration
12/13/77	Battersby (Santa Clara Co. Super. Ct.)	Complaint for Breach of California Franchise Investment Law, Declaratory Relief, Usury, Breach of Contract, Breach of Fiduciary Duty, Injunctive Relief, Fraud and Negligent Misrepresentation and Conspiracy (Class Action)
12/16/77	All Cases (Santa Clara Co. Super. Ct.)	Minute Order [postponing ruling on motion to compel arbitration]

Date	Case	Proceedings—Filings
12/19/77	All Cases (Santa Clara Co. Super. Ct.)	Order Granting Coordination Petition
1/19/78	All Cases (Judicial Council of California)	Order Assigning Coordination Trial Judge
1/20/78	Keating (Coord. Proc. No. 387)	Notice of Hearing of Petition of The Southland Corporation for Order to Arbitrate
1/25/78	All Cases (Judicial Council of California)	Order for Transfer and Procedure
1/26/78	Keating (Napa Co. Super. Ct.)	Plaintiffs' Supplemental Memorandum in Opposition to Motion to Compel Arbitration
1/30/78	Garza, Gouveia, Sampson (Coord. Proc. No. 387)	Second Amended Complaint: Breach of California Franchise Investment Law, Declaratory Relief, Usury, Breach of Contract, Breach of Fiduciary Duty, Injunctive Relief, Fraud and Negligent Misrepresentation and Conspiracy
1/30/78	Cheng, Keating, Newell (Coord. Proc. No. 387)	First Amended Complaint: Breach of California Franchise Investment Law, Declaratory Relief, Usury, Breach of Contract, Breach of Fiduciary Duty, Injunctive Relief, Fraud and Negligent Misrepresentation and Conspiracy [1]
2/3/78	Keating (Coord. Proc. No. 387)	Minute Order re Arbitration
2/16/78	Keating (Coord. Proc. No. 387)	Order re Petition for Order to Arbitrate [2]

[1] Amended Complaint in *Keating* reprinted at J.A. 12.

[2] Reprinted at J.S. App. 71a.

Date	Case	Proceedings—Filings
2/24/78	Cheng, Garza, Gouveia, Newell, Sampson (Coord. Proc. No. 387)	Notice of Hearing of Petition and Petition of The Southland Corporation for Order to Arbitrate, and Notice of Motion and Motion for Stay of Proceedings Pending Arbitration [separate petition for each named case]
3/27/78	Coy (Ala. Co. Super. Ct.)	Complaint (Class Action Alleged) for Breach of the California Franchise Investment Law
4/4/78	Keating (Coord. Proc. No. 387)	Notice of Appeal [of The Southland Corporation from Minute Order of 2/3/78 and Order of 2/16/78 re Denial of Arbitration]
4/4/78	Scovis (Los Angeles Co. Super. Ct.)	Complaint of The Southland Corporation for Possession of Collateral, Injunctive Relief, Appointment of a Receiver and Damages
4/6/78	Cheng, Garza, Gouveia, Newell, Sampson (Coord. Proc. No. 387)	Plaintiffs' Memorandum of Points and Authorities in Opposition to Southland's Motion to Compel Arbitration
4/10/78	Coy (Ala. Co. Super. Ct.)	First Amended Complaint (Class Action Alleged) for Breach of the California Franchise Investment Law
4/12/78	Scovis (Los Angeles Co. Super. Ct.)	Answer to Complaint and Cross-Complaint for Breach of California Investment Law; Declaratory Relief
4/21/78	Cheng, Garza, Gouveia, Newell, Sampson (Coord. Proc. No. 387)	Reply Memorandum of Defendant The Southland Corporation in Support of Motion to Compel Arbitration

Date	Case	Proceedings—Filings
5/5/78	Battersby, Cheng, Garza, Gouveia, Newell, Sampson (Coord. Proc. No. 387)	Order re Motions Heard on April 26, 1978 [3]
5/11/78	Coy (Ala. Co. Super. Ct.)	Second Amended Complaint (Class Action Alleged) for Breach of the California Franchise Investment Law
5/19/78	Battersby, Cheng, Garza, Gouveia, Newell, Sampson (Coord. Proc. No. 387)	Notice of Appeal [of The Southland Corporation from Order of 5/5/78 Denying Arbitration]
6/12/78	Battersby (Coord. Proc. No. 387)	Defendant The Southland Corporation's Answer to Complaint
6/12/78	Cheng, Keating, Newell (Coord. Proc. No. 387)	Defendant The Southland Corporation's Answer to First Amended Complaint [separate answer in each case] [4]
6/12/78	Garza, Gouveia, Sampson (Coord. Proc. No. 387)	Defendant The Southland Corporation's Answer to Second Amended Complaint [separate answer in each case]
6/16/78	Battersby, Cheng, Garza, Gouveia, Keating, Newell, Sampson (Coord. Proc. No. 387)	Notice of Hearing of Petition and Petition [of Employee-Defendants] for Order to Arbitrate, and Notice of Motion and Motion for Stay of Proceedings Pending Arbitration
6/16/78	Coy, Scovis (Coord. Proc. No. 387)	Notice of Hearing of Petition and Petition [of The Southland Corporation] for Order to Arbitrate, and Notice of Motion and Motion for Stay of Proceedings Pending Arbitration

[3] Reprinted at J.S. App. 73a.

[4] Answer in *Keating* reprinted at J.A. 26.

Date	Case	Proceedings—Filings
7/17/78	Battersby, Cheng, Garza, Gouveia, Keating, Newell, Sampson (Coord. Proc. No. 387)	Plaintiffs' Opposition to Petition for Order to Arbitrate Disputes
7/17/78	Coy, Scovis (Coord. Proc. No. 387)	Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Petition to Compel Arbitration and Motion to Stay Proceedings
7/18/78	Coy, Scovis (Coord. Proc. No. 387)	Reply of Defendants and Petitioners to Plaintiffs' Memorandum of Points and Authorities in Opposition to Petition to Compel Arbitration and Motion to Stay Proceedings
7/31/78	All Cases (Coord. Proc. No. 387)	Order re Motions Heard on July 19, 1978 [5]
8/16/78	All Cases (Coord. Proc. No. 387)	Notice of Appeal [of The Southland Corporation and Employee-Defendants from Order of 7/31/78 Denying Arbitration]
9/22/78	All Cases (Coord. Proc. No. 387)	Stipulation re Petition to Arbitrate, Motion to Stay Proceedings and Demurrer
9/25/78	All Cases (Coord. Proc. No. 387)	Minute Order [re Stipulation of 9/22/78]
10/3/78	Coy (Coord. Proc. No. 387)	Answer of Defendant The Southland Corporation and Individual Defendants to Second Amended Complaint
10/3/78	Scovis (Coord. Proc. No. 387)	Answer of Defendant The Southland Corporation and Individual Defendants to Cross-Complaint

[5] Reprinted at J.S. App. 77a.

Date	Case	Proceedings—Filings
10/3/78	Cheng, Garza, Gouveia, Keating, Newell, Sampson (Cal. Ct. App., First Dist., Div. Three)	[Plaintiffs'] Petition for Writs of Mandate or Prohibition; Memorandum of Points and Authorities
10/3/78	All Cases (Coord. Proc. No. 387)	Notice of Appeal [of Employee-Defendants from Minute Order of 9/25/78 Denying Arbitration]
1/5/79	Cheng, Garza, Gouveia, Keating, Newell, Sampson (Cal. Ct. App., First Dist., Div. Three)	[Defendants'] Memorandum of Points and Authorities in Opposition to Petition for Writs of Mandate or Prohibition
4/9/79	All Cases (Cal. Ct. App., First Dist., Div. Three)	Opening Appellate Brief of Appellants The Southland Corporation and Employee-Defendants
4/26/79	Cheng, Garza, Gouveia, Keating, Newell, Sampson (Cal. Ct. App., First Dist., Div. Three)	Order [granting alternative writ of mandate]
5/24/79	All Cases (Cal. Ct. App., First Dist., Div. Three)	Order Consolidating Appeals
6/4/79	All Cases (Cal. Ct. App., First Dist., Div. Three)	Plaintiffs'-Respondents' Brief
7/2/79	All Cases (Cal. Ct. App., First Dist., Div. Three)	Answer to Petition for Writs of Mandate or Prohibition [of Real Parties in Interest The Southland Corporation and Employee-Defendants]

Date	Case	Proceedings—Filings
7/2/79	All Cases (Cal. Ct. App., First Dist., Div. Three)	Supplemental Memorandum of Points and Authorities in Opposition to Petition for Writs of Mandate or Prohibition and Appellants' Reply Brief [of The Southland Corporation and Employee-Defendants]
7/10/79	All Cases (Cal. Ct. App., First Dist., Div. Three)	Petitioners-Plaintiffs' Supplemental Memorandum in re Arbitration in a Class Action
8/28/80	All Cases (Cal. Ct. App., First Dist., Div. Three)	Opinion [6]
9/12/80	All Cases (Cal. Ct. App., First Dist., Div. Three)	[Plaintiffs'] Petition for Rehearing
9/19/80	All Cases (Cal. Ct. App., First Dist., Div. Three)	[Defendants'] Answer to Petition for Rehearing
9/26/80	All Cases (Cal. Ct. App., First Dist., Div. Three)	Order Denying Petition for Rehearing
10/7/80	All Cases (Cal. Sup. Ct.)	Petition for Hearing [of The Southland Corporation and Employee-Defendants]
10/17/80	All Cases (Cal. Sup. Ct.)	[Plaintiffs'] Answer to Petition for Hearing
11/19/80	All Cases (Cal. Sup. Ct.)	Petition for Hearing Granted

[6] Reprinted at J.S. App. 47a.

Date	Case	Proceedings—Filings
1/9/81	All Cases (Cal. Sup. Ct.)	[Defendants'] Reply Brief to [Plaintiffs'] Answer to Petition for Hearing
1/26/81	All Cases (Cal. Sup. Ct.)	Plaintiffs' Response to Southland's Reply Brief
2/2/81	Garza (Cal. Sup. Ct.)	Order Dismissing *Garza* v. *The Southland Corporation* with Prejudice [pursuant to stipulation]
6/10/82	All Cases (Cal. Sup. Ct.)	Opinion [7]
8/24/82	All Cases (Cal. Sup. Ct.)	Notice of Appeal [of The Southland Corporation and Employee-Defendants] to the Supreme Court of the United States [8]
1/10/83	All Cases (U.S. Sup. Ct.)	Order [postponing determination of jurisdiction] [9]

[7] Reprinted at J.S. App. 1a.

[8] Reprinted at J.S. App. 83a.

[9] Reprinted at J.A. 86.

[Names of Attorneys for Plaintiffs Omitted in Printing]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF NAPA

No. 37402

RICHARD D. KEATING, DARLA J. KEATING, on behalf of themselves, and all other similarly situated, and as individuals,

Plaintiffs,

vs.

THE SOUTHLAND CORPORATION, a corporation, KEITH JENKINS; RAY D. BERRY; TERRY DEBARD; JOHN P. THOMPSON; JERE W. THOMPSON; WALTON GRAYSON III; JOSEPH S. HARDIN; R. G. SMITH; EUGENE PENDER; ROBERT DUNCAN; and DOES TEN through FIVE HUNDRED, inclusive,

Defendants.

FIRST AMENDED COMPLAINT (CLASS ACTION ALLEGED) FOR BREACH OF THE CALIFORNIA FRANCHISE INVESTMENT LAW, DECLARATORY RELIEF, USURY, BREACH OF CONTRACT, BREACH OF FIDUCIARY DUTY, INJUNCTIVE RELIEF, FRAUD AND NEGLIGENT MISREPRESENTATION AND CONSPIRACY

[Filed January 30, 1978]

Plaintiffs Richard D. Keating and Darla J. Keating, on behalf of themselves and all others similarly situated, allege as follows:

GENERAL ALLEGATIONS

1. Each and every allegation in these general allegations, paragraphs 1 through 11, are by this reference incorporated into each and every cause of action herein as if fully set forth therein.

Plaintiffs Richard D. Keating and Darla J. Keating reside in the County of Napa, State of California. The defendant The Southland Corporation, a corporation (hereinafter "Southland"), was, at all times material hereto, doing business under the name of 7-Eleven within the State of California and within the County of Napa. The defendants Keith Jenkins, and Ray D. Berry and Robert Duncan, sued as Doe 1 and Doe 9, respectively, are individuals, who, at all times material hereto, were residing within the State of California. The defendants at all times material hereto, were each the agents and/or employees of each of the other defendants herein and each were at all times material hereto acting within the scope of said agency and employment.

The defendants Terry DeBard, John P. Thompson, Jere W. Thompson, Walton Grayson III, Joseph S. Hardin, R. G. Smith and Eugene Pender are employees, officers and directors who actually, and as a matter of law, participated in each and every act of misconduct of defendants alleged herein.

The true names and capacities, whether individual, corporate, associate or otherwise, of defendants Does Ten through Five Hundred, inclusive, are unknown to plaintiffs and are therefore sued by such fictitious names. Plaintiffs will amend this complaint to show their true names and capacities when they have been ascertained.

2. On or about August 5, 1974, plaintiffs Richard D. Keating and Darla J. Keating and defendant Southland entered into a standard form of written agreement employed by Southland in the franchising of all 7-Eleven stores in California, by the terms of which Southland became a franchisor of and plaintiffs became a franchisee of a convenience-type grocery store, doing business under the name of 7-Eleven and known as store No. 2211-14135 E, located at 2010 Redwood Road, Napa, California (hereinafter "the store"). The written agreement referred to hereinabove is entitled as follows: 7-Eleven

Training Agreement, 7-Eleven Store Agreement, Lease Agreement (attached to Store Agreement as Exhibit "A"), and Exhibits B through F to the said Store Agreement, "Credit Card Sales" and the Security Agreement (hereinafter "7-Eleven Agreement").

3. A class action is hereby alleged pursuant to California Code of Civil Procedure, Section 382.

4. The class (hereinafter "class") consists of all persons in the State of California who are or were (within the last four years prior to the filing of this action) franchise owners of Southland's 7-Eleven stores. Each of said persons has entered into an agreement with Southland identical in all material respects to the 7-Eleven Agreement.

5. Plaintiffs are members of said class; their claims are typical of the claims of all class members. They will fairly and adequately protect the interests of the class.

6. There exist herein as to all members of the class common questions of fact, including the validity and interpretation of provisions in the standard form of 7-Eleven Agreement between members of the class and Southland. Said 7-Eleven Agreement is a standardized contract form which constitutes a contract of adhesion in that it is offered to plaintiffs and to class members on a "take it or leave it" basis without affording plaintiffs or class members a realistic opportunity to bargain and under such conditions that plaintiffs and class members could not secure franchises except by acquiescing in said agreement. The common issues of fact further include the validity of the arbitration clause contained in the 7-Eleven Agreement.

7. There exist common questions of law, including, without limitation, the validity of the arbitration clause of the 7-Eleven Agreement, the accounting issues set

forth in the fourth cause of action, whether the "late charge" (our phrase) set forth in Article 17(h) of the "7-Eleven Store Agreement" is an illegal penalty; and whether Southland may freely and without charge commingle its funds with those held in trust for members of the class.

8. The class includes at least 800 persons, and can readily be identified from the records of Southland. Joinder of all class members is impracticable.

9. The questions of law and fact which are common to members of the class predominate over questions affecting only individual members.

10. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

11. Pursuant to the 7-Eleven Agreement, each class member must deliver promptly all of the cash and other receipts of the franchised store to the care, custody and control and trust of Southland, and the individual defendants, and each of them. Southland, through its agents, including the individual defendants, and each of them, agrees to hold and disburse said funds solely for the benefit of the members of the class as provided for in said 7-Eleven Agreement. Each and every alleged breach of fiduciary duty, breach of contractual obligation, and each and every allegation of dispute set forth in the cause of action for declaratory relief, and each and every allegation of breach of the California Franchise Investment Law, and further, each and every injunctive relief sought, each willful misrepresentation and negligent misrepresentation and act of conspiracy which is alleged herein, arise directly out of or in some material way are related to the terms and conditions of the said 7-Eleven Agreement.

FIRST CAUSE OF ACTION

(Declaratory Relief—Arbitration Clause)

12. The 7-Eleven Agreement constitutes a "franchise" within the meaning of the California Franchise Investment Law (Corporations Code section 31,000 et seq.).

13. The 7-Eleven Agreement provides that controversies or claims arising out of or relating to said agreement or the breach thereof shall be settled by arbitration.

14. The arbitration clause in the 7-Eleven Agreement is intended to limit the duties and liabilities of Southland to plaintiffs and to members of the class by depriving plaintiffs and class members of their constitutional right to a trial by jury and of statutory rights, including discovery and other procedural safeguards afforded by California law.

15. Southland contends that said arbitration clause embraces, and bars judicial litigation of, the claims of plaintiffs and the class that Southland has violated the California Franchise Investment Law by inducing them to enter into the 7-Eleven Agreement by means of false statements and omissions. Plaintiffs contend on the contrary that said arbitration clause constitutes a condition, stipulation or provision purporting to require members of the class to waive rights under the Franchise Investment Law and that said clause is therefore void under Corporations Code section 31512.

16. The arbitration clause was presented to plaintiffs and to members of the class without a plain and clear notification of the terms and effect thereof and, consequently, without having secured their understanding consent thereto. The terms thereof and the important limitations imposed thereby on the duties and liabilities of Southland are beyond the reasonable expectations of the ordinary person and are oppressive and unconscionable.

17. An actual controversy has arisen and now exists between plaintiffs and the class, on the one hand, and Southland, on the other, concerning the validity and enforceability of the said arbitration clause.

WHEREFORE, plaintiffs pray judgment as hereinafter set forth.

SECOND CAUSE OF ACTION

(Violation of Franchise Investment Law)

18. The 7-Eleven Agreement constitutes a "franchise" within the meaning of the California Franchise Investment Law (Corporations Code sections 31000 et seq.).

19. Under Section 31101 of the Corporations Code, defendants were required to disclose in writing to plaintiffs and the class, at least 48 hours prior to their execution of the 7-Eleven Agreement, certain statutory information, including a statement of the franchise fee charged, the proposed application of the proceeds of such fee by the franchisor, and, if the fee is not the same in all cases, the formula by which the amount of the fee is determined. Said section further requires that, if any statement of estimated or projected franchise earnings is used, the statutory disclosure statement must state that estimation or projection, as well as the data upon which it is based.

20. Corporations Code section 31202 provides that it is unlawful for any person willfully to make any untrue statement of a material fact in any statement required to be disclosed under section 31101, above, or willfully to omit to state in any such statement any material fact which is required to be stated therein.

21. Corporations Code section 31201 provides that it is unlawful for any person to sell a franchise in this state by means of any written or oral communication which includes an untrue statement of a material fact

or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading.

22. Plaintiffs are informed and believe and based upon such information and belief allege that defendants have systematically violated section 31202 of the Corporations Code by willfully making untrue statements of material fact, and willfully omitting to state material facts which are required to be stated in statements required to be disclosed under section 31101, in the following respects:

(a) Southland's section 31101 disclosure statement contains untrue statements of material fact respecting the formula by which the 7-Eleven franchise fee is determined, in that said disclosure statement represents that discounts of various kinds from suppliers will be distributed to franchisees and no fee charged thereon, whereas in fact a franchise fee equal to approximately 50% of said discounts have been systematically charged to the class.

(b) Said statement contains purported average earnings from purportedly representative 7-Eleven stores but omits to disclose that a substantial number of stores have regularly earned less than said averages, as more fully alleged below.

23. Plaintiffs are informed and believe and based upon such information and belief allege that defendants have systematically violated section 31201 of the Corporations Code by selling franchises to plaintiffs and members of the class by means of written forms, uniformly utilized within each franchise sales area, which omit to state material facts necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading, and upon which plaintiffs and members of the class relied in purchasing franchises from defendants, as follows:

(a) Defendants' standard form sales brochure contains purported summaries of the average earnings of existing Southland franchises in each district entitled "Statement of Actual Average Earnings of all Franchised Seven Eleven Stores in District No. —— . . . and Operated Throughout the Period by a Single Franchisee." In fact, such "actual average earnings" are misleading, distorted and incomplete, in that they fail to disclose the substantially lower sales and income of a substantial number of stores in each sales area which have not, because of frequent franchisee turnover, been "operated throughout the period by a single franchisee." Plaintiffs are informed and believe and based upon such information and belief allege that stores in the latter category represent a substantial part of the total 7-Eleven stores in each district.

(b) Defendants' standardized brochures further represent that "all discounts and allowances for quantity purchases, in-store display of merchandise, promotions, and advertising, traceable to your sales or purchases, are distributed to owners by crediting costs of goods sold." That statement is false and misleading in that "all discounts" are not distributed to owners, but rather 50% or more thereof are collected by Southland as part of its franchise fee.

(c) Said sales brochures uniformly represent that "inventory shortage [will be] charged to you at cost." Said statement is false in that inventory shortage is not charged to members of the class at cost, but rather by method of a computation which artificially increases the cost of said merchandise so that a higher figure than its cost is charged to members of the class, and further because such inventory shortage results in a higher fee payable to Southland.

24. By reason of the foregoing, plaintiffs and the class have been damaged in an amount which plaintiffs are informed and believe and based thereon allege is in excess of ten million dollars ($10,000,000).

WHEREFORE, plaintiffs pray judgment as hereinafter set forth.

THIRD CAUSE OF ACTION

(Fraud—Rescission)

25. Plaintiffs reallege and incorporate by reference the allegations of the second cause of action.

26. The representations and omissions alleged in paragraph 22 and 23 are false and misleading. Defendants either knew that said representations and omissions were false and misleading at the time they were made, or knew that they did not have a reasonable basis in fact for making said representations and omissions.

27. Said representations and omissions were material to franchisees of 7-Eleven stores and to plaintiffs and members of the class. As a consequence of said material representations and omissions, plaintiffs and members of the class entered into the 7-Eleven Agreement.

28. Said representations and omissions were made by defendants with intent to induce plaintiffs and members of the class to enter into the 7-Eleven Agreement and with intent maliciously to deceive and oppress plaintiffs and members of the class.

WHEREFORE, plaintiffs pray judgment as hereinafter set forth.

FOURTH CAUSE OF ACTION

(Declaratory Relief and Accounting)

29. An actual controversy has arisen and exists between plaintiffs and the class, on the one hand, and Southland, on the other, concerning their respective rights and duties under the 7-Eleven Agreement in these respects:

(a) Whether the "late charge" provided in said agreements is valid and enforceable or whether it is an invalid penalty;

(b) Whether under Southland's accounting system, Southland has improperly and systematically charged plaintiffs and the class interest at the rate of 10% per annum on advances purportedly made by Southland to pay the invoices of their suppliers for periods of time preceding the actual payment of said invoices by Southland;

(c) Whether Southland has systematically charged plaintiffs and the class usurious interest in excess of 10% per annum on advances by Southland to suppliers, by virtue of Southland's practice of prematurely debiting the accounts of franchisees for such advances prior to the time of their actual payment and by computing interest at the rate of 10% per annum on the balance in the accounts so prematurely debited;

(d) Whether Southland has improperly collected for itself, through its franchise fee, a major portion of the discounts and allowances required by contract to be passed on to plaintiffs and members of the class;

(e) Whether Southland has breached a duty to plaintiffs and members of the class to make prompt payment to suppliers so as to secure prompt payment discounts and thereby deprived plaintiffs and members of the class of discounts to which they are entitled;

(f) Whether Southland has improperly overcharged plaintiffs and members of the class in respect to inventory shortages and inventory variations by charging more than the cost thereof to plaintiffs and members of the class;

(g) Whether Southland has charged plaintiffs and members of the class an improper and excessive franchise fee by virtue of its use of a method of valuing inventory which falsely increases the value thereof beyond its actual cost and thereby increases the franchise fees payable to Southland.

30. Southland contends that the controversies respecting contract interpretation and accounting set forth in the preceding paragraph 29 must be decided in its favor. Plaintiffs and the class contend to the contrary.

31. Plaintiffs and the class desire a judicial determination of their rights and duties and the rights and duties of Southland under the 7-Eleven Agreement with respect to the above controversies and for an accounting of all moneys determined to have been improperly collected by Southland.

WHEREFORE, plaintiffs pray judgment as hereinafter set forth.

FIFTH CAUSE OF ACTION

(Breach of Contract)

32. Plaintiffs reallege and incorporate by reference paragraph 29.

33. In breach of the 7-Eleven Agreement, Southland has charged plaintiffs and the class with each of the items alleged in paragraph 29 in the manner therein alleged.

34. The 7-Eleven Agreement, interpreted as required by law and pursuant to the principles applicable to contracts of adhesion and in light of Southland's implied obligation of good faith and fair dealing, imposes on Southland a duty not to charge the items alleged in paragraph 29 in the manner therein alleged, and said charges constitute a breach of the 7-Eleven Agreement.

35. As a result thereof, plaintiffs and the class have been damaged in an amount which is presently unknown but may be fixed by an accounting.

WHEREFORE, plaintiffs pray judgment as hereinafter set forth.

SIXTH CAUSE OF ACTION

(Breach of Fiduciary Duty)

36. Upon the 7-Eleven Agreement, plaintiffs and the class are required to, and have, deposited with Southland all cash receipts realized by them through the operation of 7-Eleven stores. At all times material hereto, Southland was in a fiduciary relationship with plaintiffs and the class and owed them a fiduciary duty to deal with said deposited funds according to the highest standards of care, not to deal adversely with said funds and, in the use thereof, not to prefer its own interest over the interests of plaintiffs and the class.

37. Nothwithstanding the fiduciary duty and obligations undertaken by Southland, Southland converted funds belonging to plaintiffs and the class to its own use and breached its contractual and fiduciary duties in the following particulars:

(a) Southland has failed to maintain in a separate account the funds deposited with Southland by the class and said funds have been commingled with the funds of Southland and used by Southland for its own benefit.

(b) Plaintiffs are informed and believe and based upon such information and belief allege that Southland has entered into payment arrangements with vendors of merchandise to members of the class providing that Southland may delay payment to such vendors, so that the funds deposited with Southland may be used by it without interest for periods of 30 to 90 days; and that Southland has so delayed said payment and has so used said funds.

(c) Plaintiffs are informed and believe and based upon such information and belief allege that Southland has systematically charged the accounts of members of the class with an interest charge based upon the amounts invoiced by vendors, although Southland had not yet paid said vendors.

(d) Plaintiffs are informed and believe and based upon such information and belief allege that Southland has systematically charged plaintiffs and the class usurious interest in excess of 10% per annum on advances by Southland to suppliers, by virtue of Southland's practice of prematurely debiting the accounts of franchisees for such advances prior to the time of their actual payment and by computing interest at the rate of 10% per annum on the balance in the accounts so prematurely debited.

38. Plaintiffs are informed and believe that the total damage arising out of said misconduct to the members of the class exceed $100,000 per week and that a sum in excess of $5,000,000 per week has been diverted to Southland's own use and benefit to be later paid into said fund through the customary accounting for the accounts of plaintiffs and members of the class.

39. In doing the acts complained of herein, Southland is guilty of fraud, oppression and malice and is therefore liable for punitive and exemplary damages in a sum in excess of $25,000,000.

WHEREFORE, plaintiffs pray judgment as follows:

(1) On the first cause of action, for a declaration pursuant to Code of Civil Procedure section 1060 of the respective rights and duties of the parties;

(2) On the second cause of action, for compensatory damages in an amount as alleged therein or according to proof at trial;

(3) On the third cause of action, for restitution of all sums expended by plaintiffs and members of the class by reason of their having entered into the 7-Eleven Agreement;

(4) On the fourth cause of action, for a declaration pursuant to Code of Civil Procedure section 1060 of the respective rights and duties of the parties for an accounting of all moneys determined to have been improperly

collected by Southland, and for a refund of all interest paid in violation of the usury laws together with treble damages thereon as provided by law;

(5) On the fifth cause of action, for damages as alleged therein or according to proof at trial;

(6) On the sixth cause of action, actual damages according to proof, for a refund of all interest paid in violation of the usury laws together with treble damages thereon as provided by law, and for punitive damages of $25,000,000;

(7) For costs of suit and attorneys' fees;

(8) For such other relief as the court determines to be proper.

Dated:

CARROLL, BURDICK & MCDONOUGH
ROBERT M. BROWN LAW CORPORATION
STARK, STEWART, SIMON & SPARROWE

by _____
Attorneys for Plaintiffs and the Class

[Verification Omitted in Printing]

[Names of Attorneys for Defendant Omitted in Printing]

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Coordination Proceeding
Special Title (Rule 1550(b))

MARKET FRANCHISE CASES

JUDICIAL COUNCIL
COORDINATION PROCEEDING
No. 387

[List of Coordinated Cases Omitted in Printing]

Relating to: KEATING v. SOUTHLAND,
Alameda Superior Ct. No. 505159-9

DEFENDANT THE SOUTHLAND CORPORATION'S ANSWER TO FIRST AMENDED COMPLAINT

[Filed June 12, 1978]

Defendant THE SOUTHLAND CORPORATION (hereinafter "Southland") for itself alone answers the First Amended Complaint ("Complaint") filed January 30, 1978 as follows:

ANSWER TO GENERAL ALLEGATIONS

1. As to the allegations hereinafter denied in this Answer for lack of information or belief, Southland has no information or belief on the subject of such allegations sufficient to enable it to answer such allegations so denied and, placing its denial on that ground, denies each and every allegation.

2. Answering the allegations contained in paragraph 1, Southland admits that plaintiffs reside in the County of Napa in the State of California; admits that Southland was at all times material hereto doing business under the name 7-Eleven within the State of California and within the County of Napa; admits that defendants Jenkins, Berry, and Duncan are individuals; admits that defendants DeBard, Thompson (John), Thompson (Jere), Grayson, Hardin, Smith and Pender are employees, officers, and/or directors of Southland; denies for lack of information or belief the allegations commencing at page 2, line 21 through 26; and except as so admitted and denied for lack of information or belief, denies each and every allegtion thereof.

3. Answering the allegations contained in paragraph 2, Southland admits that on the date indicated therein it entered into with plaintiffs the 7-Eleven Training Agreement, the 7-Eleven Store Agreement, including the exhibits thereto, and the Security Agreement for the store set forth therein; and except as so admitted, denies each and every allegation thereof.

4. Answering the allegations contained in paragraphs 3, 4, 5, 6, 7, 8, 9, and 10, Southland denies each and every allegation contained therein.

5. Answering the allegations contained in paragraph 11, Southland admits and alleges that the 7-Eleven Agreement entered into on August 5, 1974 required Owners to deposit daily all merchandise sales and money order receipts, discounts received by Owners and miscellaneous income from Owners' Operation (the "Sales Receipts") (except such of the Sales Receipts as have been expended in cash by Owners for Purchases or for Operating Expenses and so reported to 7-ELEVEN), in a bank, or the night depository thereof, designated by 7-ELEVEN, and deliver to 7-ELEVEN, on such days as may be designated by 7-ELEVEN, a verified duplicate deposit receipt

therefor bearing said bank's stamp; or where requested by 7-ELEVEN, deliver the Sales Receipts (except those as provided above) to an authorized representative of, or a person designated by, 7-ELEVEN on such days as may be designated by 7-ELEVEN; and under said agreement, said deposits were credited to Owners' open account. Except as so admitted and alleged, Southland denies each and every allegation thereof.

ANSWER TO THE ALLEGED
FIRST CAUSE OF ACTION

6. The First Cause of Action has already been adjudicated and no answer to this cause of action is therefore necessary at this time. In addition, pursuant to stipulation between counsel for plaintiffs and counsel for Southland, no answer or affirmative defenses to the alleged First Cause of Action need be filed at this time.

ANSWER TO THE ALLEGED
SECOND CAUSE OF ACTION

7. Answering the allegations contained in paragraph 18, Southland admits the allegations therein and further admits and alleges that it is exempt from the California Franchise Investment Law by virtue of section 31101 of the California Corporations Code.

8. Answering the allegations contained in paragraph 19, Southland admits and alleges that from and after January 1, 1971, the effective date of the California Franchise Investment Law, California Corporations Code section 31101 provided that in order to be exempt under certain provisions thereof, a franchisor must, *inter alia*, disclose in writing to each prospective franchisee, at least 48 hours prior to the execution by the prospective franchisee of a franchise Agreement, or at least 48 hours prior to the receipt of any consideration, the following information: 1) A statement of the franchise fee charged,

the proposed application of the proceeds of such fee by the franchisor, and the formula by which the amount of the fee is determined if the fee is not the same in all cases; and 2) if any statement of estimated or projected franchisee earnings is used, a statement of such estimation or projection and the data upon which it is based.

9. Paragraph 20 does not call for an answer. However, answering the allegations of paragraph 20, Southland admits that California Corporations Code section 31202 provides: "It is unlawful for any person willfully to make any untrue statement of a material fact in any statement required to be disclosed in writing pursuant to Section 31101, or willfully to omit to state in any such statement any material fact which is required to be stated therein."

10. Paragraph 21 does not call for an answer. However, answering paragraph 21, Southland admits that California Corporations Code section 31201 provides: "It is unlawful for any person to offer or sell a franchise in this state by means of any written or oral communication not enumerated in section 31200 which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading."

11. Answering the allegations contained in paragraphs 22, 22(a), 22(b), 23, 23(a), 23(b), 23(c) and 24, Southland denies each and every allegation contained therein, and specifically denies that defendants have in any manner whatsoever violated the California Franchise Investment Law, including, but not limited to, sections 31101 and 31200-31202, thereof, and further denies that plaintiffs are entitled to the damages alleged in paragraph 24 or any sums or damages whatsoever.

ANSWER TO THE ALLEGED THIRD THROUGH SIXTH CAUSES OF ACTION

12. Pursuant to stipulation of counsel, no answer need be made to the alleged third through sixth causes of action since the Court has ordered these claims arbitrated.

As affirmative defenses to the alleged Second Cause of Action only, and without waiving its right to assert affirmative defenses to the other alleged causes of action at some later time if it becomes necessary, Southland alleges as follows:

FIRST AFFIRMATIVE DEFENSE

(Failure of Complaint to State Claim for Relief)

13. As a separate and First Affirmative Defense to the alleged Second Cause of Action of the Complaint, Southland alleges that said cause of action does not set forth facts sufficient to state any claim for relief against it.

SECOND AFFIRMATIVE DEFENSE

(Waiver)

14. As a second, separate and affirmative defense to the alleged Second Cause of Action of the Complaint, Southland is informed and believes, and upon that basis alleges that plaintiffs, and each of them, have waived their right, if any they had, to any relief for recovery of damages on the basis of violations of the California Franchise Investment Law. At or before the time of trial of the within lawsuit, this answering defendant will seek leave of court to amend this answer to set forth such acts and conduct on the part of plaintiffs as may then be known to this answering defendant in support of this affirmative defense.

THIRD AFFIRMATIVE DEFENSE

(California Corporations Code Sections 31300 and 31301)

15. As a separate and Third Affirmative Defense to the alleged Second Cause of Action of the Complaint, Southland is informed and believes and on that basis alleges that said action is barred by California Corporations Code sections 31300 and 31301 in that plaintiffs knew the facts concerning the alleged untruths or omission; Southland further alleges that it exercised reasonable care and did not know, or if it had exercised reasonable care, it would not have known, of the alleged untruths or omissions.

FOURTH AFFIRMATIVE DEFENSE

(California Corporations Code Section 31302)

16. As a fourth, separate and affirmative defense to the alleged Second Cause of Action of the Complaint, Southland alleges that said action is barred by Section 31302 of the Corporations Code of the State of California.

FIFTH AFFIRMATIVE DEFENSE

(California Corporations Code Section 31303 and 31304)

17. As a fifth, separate and affirmative defense to the alleged Second Cause of Action of the Complaint, Southland alleges said cause of action is barred by the Statute of Limitations contained in Sections 31303 and 31304 of the Corporations Code of the State of California.

SIXTH AFFIRMATIVE DEFENSE

(Exemption from California Franchise Law)

18. As a sixth, separate and affirmative defense to the alleged First Cause of Action of the Complaint, Southland alleges that it is exempt from the provisions, regulations, and requirements of the Franchise Investment Law

and has fully complied with all requirements for exemption therefrom.

SEVENTH AFFIRMATIVE DEFENSE

(Not a Proper Class Action)

19. As a separate and Seventh Affirmative Defense to the alleged Second Cause of Action of the Complaint, Southland alleges:

a. The Second Cause of Action does not set forth facts sufficient to state the elements of a proper class action.

b. The questions of law and facts sought to be raised as to the purported class of persons which plaintiffs seek to represent are not of common and general interest to plaintiffs and to any one or more of said persons.

c. Such common questions of fact and law as may exist among plaintiffs and any one or more of said persons are not sufficiently important to the ultimate resolution of the asserted claims to permit their adjudication in a class action.

d. The purported class of persons which plaintiffs seek to represent herein is not an ascertainable class of plaintiffs within the meaning of Section 382, Code of Civil Procedure or Rule 23 Federal Rules of Civil Procedure and do not have a well-defined community of interest in the questions of law and fact sought to be raised herein.

e. Plaintiffs are not members of the purported class of persons which they seek to represent herein. Plaintiffs do not and cannot fairly represent the rights or protect the interests of the members of said purported class of persons which they seek to represent herein.

f. The interest of each of said purported class of persons is such as to assure the assertion of individual claims, thereby precluding any necessity for a class action in order to assure the assertion of such claims.

g. By reason of each and all of the foregoing, the within action is not a proper class action by plaintiffs.

EIGHTH AFFIRMATIVE DEFENSE

(Abatement By Virtue of Prior Pending Actions)

20. As a separate and Eighth Affirmative Defense to the alleged Second Cause of Action of the Complaint, Southland alleges:

a. Prior to or at the commencement of this action, persons whom plaintiffs purport to represent as class members filed in the Superior Court of the State of California, civil actions against Southland, entitled:

(1) *THOMAS L. SAMPSON AND WANDA LEE SAMPSON* vs. *THE SOUTHLAND CORPORATION, a corporation, et al.*, No. 505161-4;

(2) *PATRICK S. CHENG AND CATHY D. CHENG* vs. *THE SOUTHLAND CORPORATION, a corporation, GENE JANSSEN and CURTIS PARE, and DOES ONE THROUGH FIFTY*, No. 505162-3;

(3) *PHILLIP C. NEWELL AND JOAN R. NEWELL* vs. *THE SOUTHLAND CORPORATION, a corporation, FRED ELWOOD, JOSEPH GALEA, BARBARA GALEA, MICHAEL WILDMAN, and DOES ONE through FIFTY, inclusive*, No. 505164-1;

(4) *PAULINO GARZA AND MARIA J. GARZA* vs. *THE SOUTHLAND CORPORATION, a corporation, GENE JANSSEN, MICHAEL WILDMAN, MICHAEL DRURY, PHIL THOMPSON and DOES ONE through FIFTY, inclusive*, No. 505160-5;

(5) *EDWARD J. GOUVEIA AND BETTY GOUVEIA* vs. *THE SOUTHLAND CORPORATION, et al.*, No. 469216-2;

(6) *HARRY BATTERSBY* vs. *THE SOUTHLAND CORPORATION, a corporation, RAY D.*

BERRY; TERRY DeBARD; JOHN P. THOMPSON; JERE W. THOMPSON; WALTON GRAYSON III; JOSEPH S. HARDIN; R.G. SMITH; EUGENE PENDER; and DOES TEN THROUGH FIVE HUNDRED, inclusive, No. 390132;

(7) *MICHAEL M. COY AND GLORIA G. COY* vs. *THE SOUTHLAND CORPORATION, A Corporation; TAL COLSON; RAY D. BERRY; TERRY DeBARD; JOHN P. THOMPSON; JERE W. THOMPSON; WALTON GRAYSON III; JOSEPH S. HARDIN; R. G. SMITH; EUGENE PENDER; S. R. DOLE; and DOES ONE through FIVE HUNDRED, inclusive,* No. 506120-6; and

(8) *ARTHUR SCOVIS AND JENNY SCOVIS* vs. *THE SOUTHLAND CORPORATION, a corporation; JAY DEL GEORGIO; SAMUEL DI SPALTRO; MICHAEL CUTTER; RAY D. BERRY; TERRY DeBARD; JOHN P. THOMPSON; JERE W. THOMPSON; WALTON GRAYSON III; JOSEPH S. HARDIN; R. G. SMITH; EUGENE PENDER; S. R. DOLE; FRANK MEYERS; DOUGLAS PORTER; and DOES 1 through 50, inclusive,* No. C-235779.

b. These actions have been coordinated herein under the title "Market Franchise Cases." By said prior actions there plaintiffs, who are persons the plaintiffs in this action purport to represent as class members herein have alleged, *inter alia*, claims against Southland identical to claims raised in this action.

d. [*sic*] By reason of the foregoing, the commencement of this action by plaintiffs constitutes an improper splitting of an alleged single cause of action against defendant arising out of said agreements, and Southland is entitled to have this action abated as to those persons.

NINTH AFFIRMATIVE DEFENSE

(Failure to Seek Arbitration)

21. As a ninth, separate and affirmative defense to the alleged Second Cause of Action of the Complaint, Southland alleges:

(a) that the 7-Eleven Store Agreement entered into between plaintiffs and Southland provides, in part, that should a controversy or claim arise out of or relating to the Agreement, said controversy and/or claim shall be settled by arbitration in accordance with the Rules of the American Arbitration Association and that plaintiffs or Southland may file with the Association a demand for arbitration at any time;

(b) that plaintiffs contend, by their Complaint, that a controversy and claim arose, relating to said Agreement; and

(c) that plaintiffs have failed and refused to demand arbitration in accordance with the terms of said Agreement, and are accordingly barred from suit herein.

WHEREFORE, this answering defendant prays that:

1. Plaintiffs take nothing by their Complaint;

2. This answering defendant be awarded its costs of suit herein; and

3. The Court award such other and further relief as is just and proper in the premises.

DATED: June 8, 1978.

ARNOLD & PORTER
McKENNA & FITTING

By /s/ Charles G. Miller
Attorneys for Defendant
The Southland Corporation

[Verification and Proof of Service Omitted in Printing]

IN THE SUPREME COURT
OF THE UNITED STATES

THE SOUTHLAND CORPORATION, *et al.*,
Appellants,

v.

RICHARD D. KEATING, *et al.*,
Appellees.

ORDER

Filed January 10, 1983

Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.